Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MILTON SONNEBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a duty of disclosure is an element of the federal mail and wire fraud statutes.

2. Whether a court — interpreting the federal mail and wire fraud statutes — commits reversible error when it holds that "both before and after the Neder decision, duty to disclose is not a required element of the common-law fraud offenses when there have been material non-disclosures."

3. Whether a court's refusal to instruct the jury on the duty of disclosure in a mail and wire fraud case may ever constitute harmless error.

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Appendix C — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated July 14, 2003 ..... 25a

Petitioner Milton Sonneberg respectfully requests that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Third Circuit, entered on April 4, 2003, which affirmed the United States District Court's denial of Petitioner's Motion pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

On April 6, 2001, the United States District Court for the District of New Jersey dismissed Petitioner's 28 U.S.C. § 2255 Motion without holding an evidentiary hearing. *Unpublished letter opinion (Civil Action No. 00-1000 NHP).* [Appendix "B"]

On April 4, 2003, the United States Court of Appeals for the Third Circuit affirmed the decision of the District Court denying the § 2255 Motion. *2003 U.S. App. Lexis 6503 (3rd Cir. 2003).* [Appendix "A"]

On July 14, 2003, the Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing or Hearing En Banc. [Appendix "C"]

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 2255. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION OF THE UNITED STATES

Fifth Amendment – Rights of Persons

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

Sixth Amendment – Rights of Accused in Criminal Prosecutions

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL STATUTES

28 U.S.C. § 2255

> A prisoner in custody . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack, may move the court

which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law. . . .

If the court finds that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A second or successive motion must be certified . . . by a panel of the appropriate court of appeals to contain...a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Title 18 – Section 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin,

obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18 – Section 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five

> years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

THE IMPORTANCE OF GRANTING THE PETITION

There remains a particularly troubling split of opinion among the Circuit Courts of Appeals regarding the elements of the federal mail and wire fraud statutes. This Court's guidance is needed in order to harmonize the Court's decisions in *Chiarella v. United States*; *Neder v. United States*; *and Carter v. United States.*

In 1980, in *Chiarella v. United States*, this Court clearly articulated the common law principle that one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to disclose. In 1999, in *Neder v. United States*, the Court clearly articulated that the mail and wire fraud statutes are not broader than common law fraud. *Neder* also clearly stated that when Congress enacts a statute using a common law term with a well-settled meaning, courts must infer that Congress intended to incorporate the common law meaning unless the statute specifies otherwise. Just a year later, in *Carter v. United States*, the Court reiterated its analysis in *Neder*, ruling that just as Courts must infer common law meaning from common law terms, so must they infer that common law terms cannot be disregarded when they do appear in a statute.

These holdings notwithstanding, Circuit Courts of Appeals have continued to rule that a duty to disclose is not an element of the federal mail and wire fraud statutes.

Petitioner was convicted under the mail and wire fraud statutes for failure to disclose certain information. The trial court refused to instruct the jury that in order to convict, they must find that Petitioner was under a duty to disclose. The Court of Appeals for the Third Circuit affirmed, holding that a duty of disclosure is not always a required element of the mail and wire fraud statutes.

Petitioner's case presents the ideal opportunity for the Court to dot the last "i" and cross the last "t" and clearly hold that a duty of disclosure is a required element of the mail and wire fraud statutes.

STATEMENT OF THE CASE

Petitioner Milton Sonneberg was convicted by a jury in the District Court of New Jersey on a thirty-count indictment based upon his participation in the promotion and sale of ownership interests in wireless cable television systems and radio stations. The indictment charged Petitioner with conspiracy, mail fraud, wire fraud, and the interstate transportation of money obtained through fraud. The overriding theme of the indictment and the government's presentation at trial was that Petitioner had defrauded his customers by failing to disclose to them that some years earlier he had pleaded guilty to a criminal securities violation. The indictment stated: "It was the principal object of the conspiracy . . . to omit and fail to make disclosures of material information to the investing public . . . regarding . . . the true backgrounds of the persons promoting and offering the investments."

Petitioner sought to rebut the government's charges with, *inter alia*, a tape recording on which a witness stated that he

planned to perjure himself at trial. One week after agreeing to "cooperate" with the prosecutor, Herb Herr, the government's star witness against Petitioner, was recorded saying to another indicted colleague:

> My feeling is we can lie better than he [Sonneberg] can tell the truth. Three good lies outweigh a good truth any time. . . . Well, that's his word [Sonneberg's] against ours. And if you're lying . . . you're going to have to lie and if he [Sonneberg] calls us, we're going to have to be consistent with the lie. And that's all there is to it.

The prosecution fought vigorously to keep the tape out of evidence. The trial judge eventually allowed Petitioner to use a small portion of a *transcription* of the tape on cross-examination. When counsel for Petitioner asked Herr if he had spoken the words cited *supra*, Herr answered no. When Petitioner's counsel showed him those excerpts the judge had admitted, Herr replied that he had must have been joking or in denial. Petitioner argued that without hearing the tape itself, the jury did not have the opportunity to qualitatively assess the context, the tenor, or the tone of voice in which the statements were made.

The trial judge then held that the tape became inadmissible surplusage once the jury had heard the excerpted transcribed portion. The government continued to insist the tape be kept out maintaining — quite astonishingly — that the tape was inadmissible because the only thing Petitioner could do with it was "impeach the witness's credibility."

SUMMARY OF ARGUMENT

Chiarella v. United States clearly articulated the common law principle that one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to disclose. *Neder v. United States* clearly stated that *Durland v. United States*, 161 U.S. 306, 313-14 (1896), did not hold that the mail and wire fraud statutes are broader than common law fraud. *Neder* also clearly articulated the principle that courts must infer that Congress intended to incorporate the common law meaning into a statute unless the statute specifies otherwise. *Carter v. United States* stands for the principle that common law terms cannot be disregarded when found in a statute.

It is inconceivable under that framework that while Congress intended to make materiality an element of the offense, it also chose to exclude the common law principle that criminal liability for material omission requires a duty to disclose. The statute does not specify otherwise, and courts are bound to infer common law meanings unless Congress specifies otherwise. ("[A]ctionable fraud requires a material misrepresentation or omission") (citing Restatement (Second) of Torts §§ 538 (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §§ 108 (5th ed. 1984))). Accordingly, in a prosecution for omission of material information, a duty to disclose is an essential element of the offense.

Petitioner's conviction must be vacated.

ARGUMENT

In this petition for a writ of certiorari, Petitioner maintains that his conviction must be vacated because an intervening change in the law has clearly held that the conduct for which he was convicted was, and is, not criminal.

I. *Neder v. United States* and its Implications

On June 10, 1999, this Honorable Court held, *Neder v. United States*, that the federal mail and wire fraud statutes do not encompass more than common law fraud. The issue in Neder was "whether materiality is an element of a scheme or artifice to defraud under the federal mail fraud (18 U.S.C. § 1341), wire fraud (§ 1343) and bank fraud (§ 1344) statutes." *Id.* at 19, 1839, 54. This Court left no room for misunderstanding:

> It is a well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the . . . common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.

Neder, at 22, 1840, 55. [Internal citations omitted]

> Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common law terms it uses, we cannot infer from the absence of an express reference to materiality

> that Congress intended to drop that element from the fraud statutes. On the contrary, we must *presume* [emphasis in original text] that Congress intended to incorporate materiality.

Id.

> . . . [T]he fraud statutes did not incorporate *all* the elements of common-law fraud. But...the Government has failed to show that the [statutory] language is inconsistent with a materiality requirement.

Id.

In the instant matter, the prosecution insisted, and the lower courts erroneously agreed, that a duty to disclose is not an element of the federal mail and wire fraud statutes. *Neder* says just the opposite.

Fraud has accumulated a settled meaning under the common law. The mail and wire fraud statutes–the very same statutes at issue in *Neder* — do not otherwise dictate. Accordingly, the Courts in the instant matter must infer that Congress means to incorporate the established meaning of fraud into the mail and wire fraud statutes.

Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common law terms it uses, the lower courts in the instant matter were wrong to infer from the absence of an express reference to a duty to disclose that Congress intended to drop that element from the fraud statutes. On the contrary, the lower courts should have *presumed* that Congress intended to incorporate a duty to disclose.

The government in the instant matter has failed to argue, let alone show, that the language of the mail and wire fraud statutes is inconsistent in any way with a duty to disclose requirement.

Just a year later, on June 12, 2000, this Court ruled on the converse of the *Neder* issue. In *Carter v. United* States, the petitioner argued that common law terms that had been included in a particular statute should be disregarded. The Court reiterated the reasoning in *Neder*:

> [W]e have not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law. In *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999), for example, we addressed whether materiality is required by federal statutes punishing a "scheme or artifice to defraud." *Id.* at 20, and 20-21, nn. 3-4 (citing 18 U.S.C. §§ 1341, 1343, 1344). Unlike the statute in *Wells*, which contained no common-law term, these statutes did include a common-law term — "defraud." 527 U.S. at 22. Because common-law fraud required proof of materiality, we applied the canon to hold that these federal statutes implicitly contain a materiality requirement as well. *Id.* at 23. Similarly, in *Evans v. United States*, 504 U.S. 255, 261-264, 119 L. Ed. 2d 57, 112 S. Ct. 1881 (1992), we observed that "extortion" in 18 U.S.C. § 1951 was a common-law term, and proceeded to interpret this term by reference to its meaning at common law.

II. The Intervening Change in the Law

This Court's decision in *Neder v. United States* was an intervening change in the law, applicable to Petitioner. The Court of Appeals incorrectly held that the law was not "intervening" as to Petitioner because the court misstated the date on which *Neder* was decided. The Court of Appeals incorrectly wrote: "In fact, Neder was decided on February 23, 1999." In fact, *Neder* was decided on June 10, 1999. Petitioner's conviction became final on March 5, 1999, three months *before* the decision in *Neder*, rendering the *Neder* decision "an intervening change in the law."[1]

Neder was a change in the law that directly affected the very core of Petitioner's case. Petitioner was convicted for failure to disclose information to potential customers. *Neder* held that the mail and wire fraud statutes do not go beyond the elements of common law fraud. It is difficult to imagine a case more clearly on point.

III. Duty to Disclose

The Court of Appeals made statements that directly contradict this Court's opinion in *Neder*. The Court of Appeals stated that "duty to disclose is not always a required element of common law fraud when there has been a material non-disclosure." The court went on to support that statement with a case from 1909, one from 1892, and a third from 1888.

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1. It is particularly unsettling that the Court of Appeals, in its opinion affirming the denial of Petitioner's 2255 motion, cited exactly the same incorrect date as did the prosecution in its brief, to support the erroneous conclusion that Neder was not "intervening" as to Petitioner. Petitioner fears that the Circuit Court did not accord his 2255 motion the *de novo* review to which it was entitled.

These cases are clearly inapposite since this Honorable Court — in *Neder* — made clear that *Durland* and its progeny do not support the proposition that the mail and wire fraud statutes sweep more broadly than common law fraud.

Continuing, the Court of Appeals wrote that Petitioner had ignored "the substantial precedent establishing that duty to disclose is not always a required element of common law fraud when there has been a material non-disclosure." In support, the court cited four cases from other circuits, cases that pre-date *Neder,* necessitating a careful review of any holdings related to the mail and wire fraud statutes and common law fraud. In the end, the Court of Appeals cited two cases from 2000 that also held that duty to disclose is not always a required element of common law fraud when there has been a material non-disclosure. These cases are clearly distinguishable on the facts and on the law. Moreover, Petitioner respectfully maintains that two Circuit Court opinions do not "substantial precedent" make. Petitioner respectfully maintains as well that the Court of Appeals erred when it identified the "precedent" as decisions from other circuits, rather than the United States Supreme Court's decisions in *Neder* and *Carter*.

At common law, defraud meant an affirmative misrepresentation of a material fact, or a failure to disclose if there is an independent duty to disclose. The duty to disclose "arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Chiarella*, at 228.

Even a casual reading of the record in this matter reveals that the government *could not prove* and *did not prove* that

Petitioner ever made affirmative misrepresentations. For that reason, every count in the indictment was clothed — nay bundled tight — in the issue of disclosure. But the prosecution also *could not prove* and *did not prove* that Petitioner was in a trust relationship with anyone he contacted about wireless cable or radio stations. At the risk of casting himself as a sleazy salesman, Petitioner continues to maintain — and the record reflects — that Petitioner was a salesman. He was a telemarketer who called people on the telephone and tried to sell them interests in business ventures. Petitioner was not their representative. He was not their broker. He was not an officer, director or principal of any company he was promoting, positions that might trigger a fiduciary or trust relationship. The indictment against Petitioner *did not charge* that the companies he was promoting were securities, a product that can, under certain circumstances, trigger a fiduciary relationship. But insistent on eating their cake and having it too, the prosecution mixed securities law in with common law fraud in an attempt to get to the affirmative misrepresentations or failure to disclose that it needed to have Petitioner convicted.

IV. It is Impossible to Tell on what Ground/Grounds the Jury Based Its Verdict

The verdict in this case must be vacated in its entirety. A general jury verdict cannot survive if one of the government's theories is unconstitutionally or legally insufficient. *Yates v. United States*, 354 U.S. 298, 312 (1957). Using the familiar "impossible to tell" concept, it is, in fact, impossible to tell what the jury decided and on what grounds they reached their verdict.

Most significant, the trial judge and the prosecution unknowingly, but presciently, ruled that Petitioner's conviction must now be vacated in its entirety. The following statements were made on the record made by the court and by the government:

> In the case at hand, the reference in the Indictment to the prior criminal convictions and civil fraud injunctions are not only relevant, *but actually constitute the alleged misrepresentation which caused the conspiracy to defraud*. . . .

(A-23) [emphasis added].

> [T]he Government's recitation of defendants' past criminal convictions and civil fraud injunctions in the relevant counts does not create grave doubt [about the independence of the grand jury]. *Rather, this information is a crucial element of the fraud charges asserted against defendants*. . . .

(A-32) [emphasis added].

> Moreover, *these acts* [the unfounded allegations of material misrepresentation] *are evidence which the Government will allegedly use* to prove defendants' background plan, intent, motive and knowledge *in support of the fraud and the conspiracy charges*.
>
> *These activities are inextricably intertwined with the charged offenses*. . . .

(A-24) [emphasis added].

The counts alleging affirmative misrepresentations and the counts alleging failure to disclose are "inextricably intertwined." It is impossible to tell.

V. Failure to Disclose Requires a Duty To Disclose

A. The Failure of a Court to So Instruct a Jury Can Never Be Harmless Error

The failure to instruct on a duty to disclose can never be harmless error if common law principles apply in a non-disclosure prosecution under the mail and wire fraud statutes. The jury is presumed to follow the instructions they are given. The federal fraud statutes fail to specify what conduct constitutes criminal non-disclosure. While it might be clear what constitutes a misrepresentation, for a non-disclosure, absent other guidance, a criminal defendant inevitably relies on the common law (and common sense) principle that one commits fraud by failing to disclose only when he is under a duty to do so.

Otherwise, after the consummation of a transaction, any dissatisfied party could invoke the criminal fraud statutes to claim "but-for" the fact they were unaware of certain information, they never would have entered into the transaction. Commerce would come to a standstill. Any information not disclosed prior to the consummation of the transaction could retroactively become a material omission, even though the "injured" party never inquired as to such facts.

In truth, the failure to inquire stems from the fact that the information was not truly material to the original decision to engage in the transaction. The notion of caveat emptor

would be consigned to the trash bin of history, and the government could charge anyone at any time with criminal non-disclosure. The notion of "notice" that is required for the imposition of either civil or criminal liability would become meaningless.

Proof of intent would be nullified for it would be impossible to determine whether a question never asked, but that might have been answered truthfully, equals criminal intent not to offer information. The reach of such a criminal construct must inevitably lead to absurd and limitless results.

VI. Circuit Split

The Sonneberg decision is inconsistent with the following decisions of sister circuits:

United States v. Watkins, 278 F.3d 961 (9th Cir. 2002), — which ruled that the *Neder* decision "settles the analytical framework for interpretation of 'intent to defraud.'" *Watkins* imports into the federal fraud statutes the common law meaning of the word "defraud" stating that the fraud statutes impose criminal liability for affirmative misrepresentations.

Ayres v. General Motors Corporation, 234 F.3d 514 (11th Cir. 2000), — which held that the manufacturer's failure to inform the plaintiffs of potential problems with a component, even if required by the Safety Act, did not violate federal mail and wire fraud statutes.

In ***Ayres***, the Court wrote:

> An examination of the common law with respect to when a failure to disclose is fraudulent also

> supports the proposition that a nondisclosure of material information can constitute fraud when there is a duty to disclose. In *Chiarella v. United States*, 445 U.S. 222, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980), the Supreme Court explained: At common law misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent. But one who fails to disclose material information prior to the consummation of a transaction commits fraud only when one party has information "that the other party is entitled to know because of a fiduciary or other similar relationship of trust and confidence between them." *Id.* at 227-28, 100 S. Ct. at 1114.

Langford v. Rite-Aid of Alabama, Inc., 231 F.3d 1308 (11th Cir. 2000), — which ruled that there can be no liability under the federal fraud statutes for failure to disclose absent a duty to make disclosure. [Failure to disclose pricing policies to uninsured retail drug customers will not sustain an action for fraud].

United States v. Gee, 225 F.3d 885 (7th Cir. 2000), — which states there is no liability for fraud unless the defendants made a material misrepresentation.

In re J.T. Haun, CTA6 No. 01-6067 — wherein the Sixth Circuit compared the *Neder* decision to the change in law brought about by *Bailey v. United States*, 516 U.S. 137 (1995). It directed Haun to present his claim of actual innocence based on *Neder* to the district court in the format for an application for habeas corpus under Section 2241 as opposed to an application for leave to file a second or successive 2255 motion.

United States v. Colton, 231 F.3d 890 (4th Cir. 2000), — which ruled against the defendant on a theory of fraudulent concealment of material information from a bank; but ruled that mere non-disclosure does not constitute the basis for fraud liability, stating that mere "silence" does not give rise to an action for fraud.[2] The Court stated that *Neder* "articulated the outer boundary for the interpretation of the federal fraud statutes." The *Colton* decision acknowledged that *Neder* rejected *Durland v. United States*, 161 U.S. 306, 313-14 (1896), and had limited the scope of the federal fraud statutes to the territory covered by common law fraud.

The Sonneberg decision is inconsistent with decision of the Fourth, Sixth, Seventh, Ninth and Eleventh Circuits. The Court should grant certiorari to resolve the conflict.

CONCLUSION

Petitioner prays that this Honorable Court grant the writ and vacate the conviction. Alternatively Petitioner respectfully asks that he be heard in oral argument.

Respectfully submitted,

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2. By contrast, in *Sonneberg*, the District Court's overly broad interpretation of the scope of the fraud statutes caused it to expressly instruct the jury that "silence" did constitute grounds for conviction. (A.1479; TT 3059:24).